

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GARY S. GUTMAN,

Plaintiff,

Case No. 1:09-cv-628

v

HON. JANET T. NEFF

GENE I. WRIGGLESWORTH, et al.,

Defendants.

OPINION

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983 involving Defendants' removal of Plaintiff from the prison's kosher meal program, allegedly in violation of: (1) his substantive due process rights under the Fourteenth Amendment; (2) his procedural due process rights under the Fourteenth Amendment; (3) his rights to religious freedom under the First Amendment; (4) his right to be free from cruel and unusual punishment under the Eighth Amendment; (5) his rights under the Civil Rights of Institutionalized Persons Act; and (6) his rights under the Religious Land Use and Institutionalized Persons Act.

Defendants filed a motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) as to certain claims, arguing that Plaintiff has failed to state a claim upon which relief may be granted. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R & R), recommending that this Court grant Defendants' motion. The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de

novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion.

Plaintiff argues that the Magistrate Judge erred in both her factual conclusions and legal conclusions. (Pl. Obj., Dkt 15 at 2-4) As to the factual errors, Plaintiff restates several of the statements from his complaint, and he alleges that the Magistrate Judge failed to take these facts properly into consideration. (Pl. Obj., Dkt 15 at 3-4)

Plaintiff's factual arguments are without merit. The Magistrate Judge properly considered the factual allegations stated in Plaintiff's complaint and assumed, for the purposes of this motion, that all of these claims were true. (R & R, Dkt 14 at 1-3) It was with this presumption in mind that the Magistrate Judge proceeded to grant the Defendants' motion. (*Id.*) As such, there was no factual error.

As to the legal errors, Plaintiff alleges that the Magistrate Judge did not properly consider the fundamental injustice of Defendants' failure to continue to provide Plaintiff with kosher meals without, at the very least, giving him a warning or a written statement of the policy that he violated. (Pl. Obj., Dkt 15 at 3) He alleges that these actions violated his substantive and procedural due process rights under the Fourteenth Amendment. (*Id.*)

Plaintiff's legal arguments are without merit. The Magistrate Judge properly considered both Plaintiff's substantive and procedural due process arguments. In rejecting his substantive due process argument, the Magistrate Judge held that substantive due process protection was generally limited to areas relating to marriage, family, bodily integrity, procreation, and the like. (R & R, Dkt 14 at 4 (quoting *Albright v. Oliver*, 510 U.S. 266, 272 (1994))) As this case does not involve any of these rights, and instead falls within the specific protections of the First Amendment, the

Magistrate Judge properly concluded that Plaintiff's argument failed as to his substantive due process claim. *See Albright*, 510 U.S. at 272-73.

Similarly, the Magistrate Judge properly rejected Plaintiff's procedural due process argument. The Magistrate Judge correctly noted that the Sixth Circuit Court of Appeals has held that removing an inmate from a prison kosher food program for violation of the rule against possessing non-kosher food while on the program does not violate the inmate's procedural due process rights. (R & R, Dkt 14 at 6-7 (citing *Russell v. Wilkinson*, 79 Fed. App'x 175, 178 (6th Cir. 2003))) As the circumstances in *Russell* are almost identical to this case, the Magistrate Judge was correct in following the precedent set by that opinion and dismissing Plaintiff's procedural due process argument.

Plaintiff objects that the Magistrate Judge failed to address certain other factual allegations and/or claims presented by Plaintiff. However, the Magistrate Judge properly addressed the legal merits of Plaintiff's due process and statutory claims at issue.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court.

Because this action was filed *in forma pauperis*, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal of this decision would not be taken in good faith. *See McGore v. Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997).

An Order will be entered consistent with this Opinion.

Dated: May 5, 2010

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge